

(26,471)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 1004.

THE BRAINERD, SHALER & HALL QUARRY COMPANY,
PLAINTIFF IN ERROR,

vs.

WILSON B. BRICE, AS SOLE SURVIVING EXECUTOR OF
THE LAST WILL AND TESTAMENT OF HENRY VAN
SCHAICK, DECEASED, AND THE AMERICAN SURETY
COMPANY.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR
THE SOUTHERN DISTRICT OF NEW YORK.

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1 United States District Court for the Southern District of New York.

THE BRAINERD, SHALER & HALL QUARRY COMPANY, Plaintiff,
against

WILSON B. BRICE, as Sol^e Surviving Executor of the Last Will and Testament of Henry Van Schaick, Deceased, and The American Surety Company of New York, Defendants.

Summons.

To the above-named Defendants:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service; and in case of your failure to appear, or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Witness, the Hon. Charles M. Hough, Judge of the District Court of the United States for the Southern District of New York, at the City of New York, this 10th day of May in the year one thousand nine hundred and sixteen.

ALEX GILCHRIST, Jr., *Clerk.*

George M. Brooks, Plaintiff's Attorney, Office and Post Office Address, 120 Broadway, Borough of Manhattan, New York City.

2 United States District Court for the Southern District of New York.

THE BRAINERD, SHALER & HALL QUARRY COMPANY, Plaintiff,
against

WILSON B. BRICE, as Sole Surviving Executor of the Last Will and Testament of Henry Van Schaick, Deceased, and The American Surety Company of New York, Defendants.

Complaint.

The plaintiff above named by Geo. Murray Brooks, its attorney, complaining against the defendants above named, respectfully alleges:

I. That at all the times hereinafter mentioned the plaintiff was and still is a corporation duly organized and existing under the laws

of the State of Connecticut, and had and has its office and principal place of business at the City of Portland in the State of Connecticut, and is a citizen and resident of the State of Connecticut, within the meaning of the laws fixing and defining the jurisdiction of the United States District Court for the Southern District of New York.

II. Upon information and belief, that the defendant, The American Surety Company of New York is a corporation organized and existing under the laws of the State of New York and has its office

3 and place of business in the Borough of Manhattan, in the City, County and State of New York, and that the defendants Wilson B. Brice and The American Surety Company of New York are citizens and residents of the State of New York and of the Southern District of New York within the meaning of the laws fixing and defining the jurisdiction of the United States District Court for the Southern District of New York.

III. Upon information and behalf, that Jane C. Van Schaick, late of the City and County of Albany, in the State of New York, a citizen of the United States, was at the time of her death seized in fee simple and was in the actual possession of certain real property situated in the counties of Albany and Rensselaer in the State of New York.

IV. Upon information and belief, that the said Jane C. Van Schaick, being so seized and possessed of the said real property, departed this life on or about the 20th day of May, 1893, having theretofore in her lifetime, to wit, on or about the 21st day of January, 1890, made and published her last will, in manner and form as required by law to pass real property within the State of New York, and that the following is a true copy of the "Fifth" clause of said will:

"Fifth. I give and devise (subject to the charges and sales as hereinbefore provided) all the real estate, lands, tenements and hereditaments which I shall own or be legally or equitably entitled to at the time of my decease, as follows, to wit: an equal undivided one-half part thereof to my cousin Henry Van Schaick of New York, for and during his life only, and the remainder in fee simple in said half part to the descendants of said Henry Van Schaick who shall be living at the time of his decease, and living also at the time of my decease, if I shall survive him; an equal undivided one-fourth part of all said real estate to the descendants who shall be living at my decease of my now deceased Cousin Eliza Bloodgood, and the remaining one undivided equal fourth part of all said real estate to the descendants, who shall be living at my decease of my now deceased cousin Mrs. Mary V. S. Oddie."

4 V. Upon information and belief, that said will was there- after duly proved before and admitted to probate by the Surrogate's Court of Albany County, upon the 28th day of June, 1893, and duly recorded in the office of the Surrogate of said County as a will of real and personal estate, and letters testamentary thereon were, upon the said 28th day of June, 1893, duly issued by said Surrogate to Marcus T. Hun and Scott D. M. Goodwin, and they thereupon duly qualified as executors of said will.

VI. Upon information and belief, that Henry Van Schaick, the

cousin of the said testatrix, and mentioned in said will, survived her, and at the time of the commencement of the partition action herein-after mentioned, the said Henry Van Schaick had the following children living, viz: George Gray Van Schaick, Elizabeth Boutourline, Eugene Van Schaick and Henry S. Van Schaick, and that there never were any living descendants of any deceased child of the said Henry Van Schaick.

VII. Upon information and belief, that on or about the 7th day of September, 1894, by deed bearing date on that day, and recorded in the office of the Clerk of Albany County, on the 12th day of September, 1894, in Liber 463 of Deeds, at Page 403, the said Eugene Van Schaick with Sarah H. Van Schaick, his wife, granted bargained and sold to one Nathan Van Beil all his and her right, title and interest in all the real estate formerly of Jane C. Van Schaick devised by her under her will to Henry Van Schaick and to his descendants in remainder; that by deed bearing even date and recorded on the same day as the deed last above mentioned at page 406 of the same

5 liber, the said Nathan Van Beil granted, bargained and sold all his right, title and interest in and to the same property to the said Sarah H. Van Schaick; that on or about the 9th day of June, 1896, by deed bearing date on that day, and recorded in the office of the Clerk of Albany County, on June 12th, 1896, in Liber 478 of Deeds, page 4, the said Sarah H. Van Schaick, granted, bargained and sold to Jacob A. Cantor all her right, title and interest in and to the same property, and that the interest which was acquired by the said Jacob A. Cantor in said real property by authority of the said conveyance was acquired by him subsequently to the pending of the action hereinafter mentioned for the partition of said real property, and was subject thereto, and the said Jacob A. Cantor was bound by the proceedings taken therein.

VIII. Upon information and belief, that on or about the 30th day of January, 1896, one of John Van Schaick Oddie commenced an action in the Supreme Court, in the County of Albany, against the said Henry Van Schaick, Eugene Van Schaick, Sarah H. Van Schaick and Henry S. Van Schaick and others, for the partition of the said real property formerly of Jane C. Van Schaick and devised by her under her will to the said Henry Van Schaick and others; that such proceedings were had in said action that on the 27th day of October, 1896, by an interlocutory judgment, dated on that day, it was duly ordered and adjudged by the said Court, among other things, that the said Henry Van Schaick had an estate for his own life as tenant in common in one undivided half part or moiety in the said real property; that the defendants in said action Henry S.

6 Van Schaick, George Gray Van Schaick, Elizabeth Boutourline and Sarah H. Van Schaick, wife of Eugene Van Schaick, had equal vested estates in remainder in the one undivided half part or moiety of said real property in which the said Henry Van Schaick had an estate for his own life, the said vested remainder of each of them (except that of Sarah H. Van Schaick) being limited to commence in possession in them upon the death of the said Henry Van Schaick, if they shall survive him, and the share of each of

"proper security, as hereinafter directed, for the safe keeping and
 "preservation of the said sum during his life time, to the end
 10 "that at his decease the same may be paid over and distrib-
 "uted per stirpes among the descendants of the said
 "Henry Van Schaick and the persons to whom the said share
 "shall then belong, that then the said moiety of the said net pro-
 "ceeds shall be immediately paid over by said Referee to the said
 "Henry Van Schaick to be held by him during his life, with the full
 "use of the income thereof. The security above referred to may con-
 "sist of a bond to be executed by the said Henry Van Schaick as
 "principal, with the American Surety Company, a corporation or-
 "ganized and existing under the laws of the State of New York, as
 "surety, to the descendants now living of the said Henry Van
 "Schaick, who are parties to this action, and to such other descend-
 "ants of the said Henry Van Schaick as shall survive him, and to
 "such other persons as shall be entitled, upon the death of the said
 "Henry Van Schaick to receive any portion of the share of the said
 "proceeds in which he has a life interest. The said bond to be in the
 "penal sum of seventy-five thousand dollars (\$75,000), and to be
 "void if the said Henry Van Schaick shall, during his life time,
 "safely keep and preserve the principal of said share of said net
 "proceeds, and the said bond shall after its execution and before the
 "filing thereof, be approved by a Justice of this Court, and upon such
 "approval being given the same shall be filed in the office of the
 "Clerk of Albany County. The said last mentioned one-half of said
 "net proceeds shall include and comprise the sum of thirty-eight
 "thousand and thirty-nine dollars and eighty-seven cents (\$38,-
 "039.87) in cash, and also the four remaining mortgages, and the
 "bonds accompanying the same, executed to said Referee by
 11 "the purchasers other than the said John Hoy, said four
 "bonds and mortgages representing the aggregate sum of
 "twenty-nine thousand one hundred and forty-five dollars (\$29,145)
 "of the purchase money, and which said bonds and mortgages shall,
 "for the purpose of this distribution, be regarded as equivalent to
 "cash for the amounts secured to be paid by them respectively."

That thereafter the said Henry Van Schaick as principal and the
 defendant The American Surety Company of New York as surety
 duly made their joint and several bond in the sum of seventy-five
 thousand Dollars, bearing date the 3rd day of February, 1897, re-
 citing the decree of distribution aforesaid, bearing date the 1st day
 of February, 1897, and entered the 2nd day of February, 1897, and
 conditioned that if the said Henry Van Schaick should during his
 life time safely keep and preserve the principal of said sixty-seven
 thousand one hundred and eighty-four dollars and eighty-seven
 cents, and if such sum of \$67,184.87 should thereafter be duly ac-
 counted for and paid to his descendants, as provided for in the de-
 cree aforementioned, then said obligation to be void, else to remain in
 full force, virtue and effect; that said bond was thereafter duly ap-
 proved by a Justice of said Court and was thereupon filed in the
 office of the Clerk of Albany County; that thereupon the said moiety
 of said net proceeds, to wit: the sum of \$67,184.87 was paid over by

said Referee to the said Henry Van Schaick to be held by him during his life, with full use of the income thereof, and that a true copy of said bond is hereto annexed, marked A, and made a part hereof as if fully set forth herein.

12 IX. Upon information and belief, that on or about the 21st day of April, 1898, by deed bearing date on that day, the said Jacob A. Cantor and Lydia G. Cantor, his wife, granted, bargained, sold, released and assigned to the said Eugene Van Schaick all the right, title and interest of the said Jacob A. Cantor in all the said property formerly of said Jane C. Van Schaick, and of, in and to the proceeds thereof hereinbefore mentioned, and including all the interest and rights which were acquired by the said Jacob A. Cantor under and by authority of the conveyance hereinbefore mentioned from the said Sarah H. Van Schaick.

X. That on or about the 9th day of May, 1901, by deed bearing date on that day, the said Eugene Van Schaick for a valuable consideration, duly bargained, sold, assigned, transferred, granted, released and conveyed to the plaintiff, its successors and assigns forever, the sum of twenty thousand dollars to be payable out of the interest of the said Eugene Van Schaick in the proceeds of the sale of the real estate hereinbefore mentioned, then in the hands of the said Henry Van Schaick as aforesaid, together with all the right, title and interest of the said Eugene Van Schaick in and to said remainder up to the sum of twenty thousand Dollars aforesaid at the time of the vesting of said remainder in possession upon the death of the said Henry Van Schaick; and that a true copy of said last mentioned deed is hereto annexed and marked B, and made a part hereof as if fully set forth herein.

XI. Upon information and belief, that the said Henry S. Van Schaick died prior to the death of the said Henry Van Schaick, and left no descendants him surviving.

13 XII. Upon information and belief, that the said Henry Van Schaick died on or about the 15th day of November, 1914, leaving him surviving his children, the said George Gray Van Schaick, Elizabeth Boutourline and Eugene Van Schaick and no other living descendant.

XIII. Upon information and belief, that letters testamentary upon the estate of the said Henry Van Schaick were upon the 25th day of June, 1915, duly issued by the Surrogate's Court of New York County to the said Eugene Van Schaick and the defendant Wilson B. Brice and they thereupon duly qualified as executors of the will of the said Henry Van Schaick, deceased.

XIV. Upon information and belief, that the said Eugene Van Schaick died on or about the 27th day of January, 1916.

XV. Upon information and belief, that the said Henry Van Schaick, did not, during his life time, safely keep or preserve the principal of said sixty-seven thousand one hundred and eighty four dollars and eighty-seven cents, mentioned in the condition of the said bond, Exhibit A, and that such sum of \$67,184.87 has not been accounted for and has not been paid nor has any part thereof been paid to his descendants or to the persons to whom the same belongs,

as provided for in the decree mentioned in the said bond; that prior to the death of the said Henry Van Schaick the said sum of \$67,184.87 had been wholly lost; that since the death of the said Henry Van Schaick and before the commencement of this action the plaintiff
 14 duly demanded from the defendant Wilson B. Brice, as sole surviving executor of the estate of the said Henry Van Schaick, deceased, the payment of the said sum of twenty thousand dollars assigned to it as aforesaid, and that no part thereof has been paid.

Wherefore, the plaintiff demands judgment against the defendants for the sum of twenty thousand dollars with interest thereon from November 15, 1914, besides the costs and disbursements of this action.

GEO. MURRAY BROOKS,
Attorney for Plaintiff.

120 Broadway, New York, N. Y.

15 STATE OF NEW YORK,
County of New York, ss:

Frederick De Peyster, being duly *duly* sworn, says: That he is the agent and General Manager of The Brainerd, Shaler & Hall Quarry Company, the plaintiff above named; that he has read the foregoing complaint and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated to be alleged upon information and belief and that as to those matters he believes it to be true. That the reason why this verification is not made by the plaintiff is because the plaintiff is a foreign corporation and that the grounds of deponent's belief as to all matters not stated upon his own knowledge, are information derived from an examination of the papers mentioned in the complaint and statements made to deponent by Eugene Van Schaick and Geo. Murray Brooks.

Sworn to before me this — day of April, 1916.

16

EXHIBIT A.

Know all men by these presents.

That we, Henry Van Schaick, of No. 40 West Thirty-fourth Street, in the City of New York, as principal, and the American Surety Company of New York, having an office and principal place of business at No. 100 Broadway, in the City of New York, as surety, are held and firmly bound unto such descendants of the said Henry Van Schaick as shall be living at the time of his death, in the sum of seventh-five thousand dollars (\$75,000) lawful money of the United States, to be paid to them, their executors, administrators or assigns, to which payment, well and truly to be made, we bind ourselves, our and each of our heirs, executors, successors and assigns, jointly and severally, firmly by these presents.

Sealed with our seals. Dated the third day of February, in the year one thousand eight hundred and ninety-seven.

Whereas, by a decree of distribution entered on the 2nd day of February, 1897, in the County of Albany in an action for the partition for certain real estate, wherein John Van Schaick Oddie is plaintiff and said Henry Van Schaick and others are defendants, it is provided among other things that one-half of the net proceeds of such property sold in the said partition suit, which one-half amounts to sixty-seven thousand, one hundred and eighty-four dollars and eighty-seven cents (\$67,184.87) is adjudged to belong to said above bounden Henry Van Schaick for and during the term of his natural life, and that at the time of his death the said share shall pass to and vest absolutely in such of the descendants of said Henry Van

17 Schaick as shall then be living.

Now, therefore, the condition of this obligation is such that if the above bounden Henry Van Schaick, shall, during his lifetime, safely keep and preserve the principal of said Sixty-seven thousand, one hundred and eighty-four dollars and eighty-seven cents (\$67,184.87) and if such sum of \$67,184.87 shall thereafter be duly accounted for and paid to his descendants, as provided for in the decree aforementioned, then this obligation is to be void; else to remain in full force, virtue and effect.

HENRY VAN SCHAICK.

AMERICAN SURETY COMPANY OF NEW

YORK,

By W. L. TRENHOLM, *President*.

CORTLANDT S. VAN RENNSSELEAR,

Attorney.

Sealed and delivered in the presence of:

[SEAL] WILLIAM A. BOECKEL as to H. Van Schaick.

18

EXHIBIT B.

This indenture, made the 9th day of May, in the year one thousand nine hundred and one, between Eugene Van Schaick, of the City of New York, party of the first part, and The Brainerd, Shaler and Hall Quarry Company, a corporation duly organized and existing under the laws of the State of Connecticut, party of the second part:

Whereas, Henry Van Schaick, the father of the said party of the first part, holds for the term of his natural life the sum of sixty-seven thousand one hundred and eighty-four dollars and eighty-seven cents, being the proceeds of the sale in partition of certain lands and premises whereof an equal undivided one-half part was devised by the will of Jane C. Van Schaick, deceased, to the said Henry Van Schaick for and during the term of his natural life, and the remainder in fee simple to the descendants of the said Henry Van Schaick, living at the time of his decease, which sum was paid over to the said Henry Van Schaick pursuant to a decree of distribution, bearing date the 1st day of February 1897, and entered on the 2nd day of February, 1897, in the County of Albany, in an action for the partition of said real estate, wherein John Van Schaick Oddie was plaintiff and said Henry

Van Schaick and others were defendants; and whereas the reversion and remainder of an equal undivided one-third part of said sum of sixty-seven thousand one hundred and eighty-four dollars and eighty-seven cents belongs to the said party of the first part, and is now vested in said party of the first part, subject, however, to be divested by his death occurring before the death of the said Henry Van Schaick;

19 Now, therefore, this indenture witnesseth, that the said party of the first part, in consideration of one dollar lawful money of the United States, and other good and valuable considerations, paid by the party of the second part, does hereby bargain, sell, assign, transfer, set over, grant, release and convey unto the said party of the second part, its successors and assigns forever, the sum of twenty thousand dollars to be payable out of the said one-third interest of the said party of the first part in the said proceeds of the sale of the said real estate now in the hands of the said Henry Van Schaick as aforesaid, together with all the right, title and interest of the said party of the first part in and to said remainder up to the sum of twenty thousand dollars aforesaid at the time of the vesting of said remainder in possession upon the death of the said Henry Van Schaick.

To have and to hold, the above granted and assigned property an undivided right and interest in said remainder unto the said party of the second part, its successors and assigns forever.

And the said party of the first part does covenant with the said party of the second part, as follows: that the said party of the first part is lawfully vested in his own right of a good, absolute and indefeasible estate in remainder in an undivided one-third part of the said sum of sixty-seven thousand one hundred eighty-four dollars and eighty-seven cents, to vest in possession immediately from and after the decease of the said Henry Van Schaick; that the interest of the said party of the first part in said remainder now is and immediately from and after the decease of the said Henry Van

20 Schaick shall be free from all encumbrances in case the said party of the first part shall survive the said Henry Van Schaick; that the said party of the first part has good right, full power and lawful authority to convey the same as aforesaid that the said party of the first part will execute or procure any further or necessary assurance of the title to the undivided interest in said remainder hereby granted and assigned; and that after the decease of the said Henry Van Schaick, the said party of the first part will warrant and defend the above granted and assigned undivided interest and sum of money to the said party of the second part, its successors and assigns forever, against the lawful demands of all persons.

In witness whereof, the said party of the first part has hereunto set his hand and seal the day and year first above written.

EUGENE VAN SCHAICK. [SEAL.]

In the presence of
C. G. SMITH.
GEORGE M. BROOKS.

COUNTY OF NEW YORK, ss:

On this 11th day of May, in the year one thousand nine hundred and one, before me personally appeared Eugene Van Schaick, to me known and known to me to be the person described in and who executed the foregoing instrument and acknowledged to me that he executed the same.

C. G. SMITH,
Notary Public, N. Y. Co.

21 United States District Court for the Southern District of
New York.

L. 15-239.

THE BRAINERD, SHALER & HALL QUARRY COMPANY, Plaintiff,
against

WILSON B. BRICE, as Sole Surviving Executor of the Last Will and
Testament of Henry Van Schaick, Deceased, and The American
Surety Company of New York, Defendants.

*Third Amended Answer of Defendant Wilson B. Brice, as Sole
Surviving Executor, etc.*

The above named defendant Wilson B. Brice, as sole surviving executor of the last Will and Testament of Henry Van Schaick, deceased, by Wilson B. Brice, his attorney, for this his third amended answer to the complaint of the plaintiff, alleges:

First. He denies any knowledge or information sufficient to form a belief as to the truth of the allegations contained in the paragraphs of the complaint numbered I, III, IV, V, VI, VII, VIII, IX, X, and XI.

Second. This defendant admits that prior to the commencement of this action, plaintiff demanded from this defendant as sole surviving executor of the estate of Henry Van Schaick, payment of the sum of Twenty Thousand Dollars (\$20,000.) as alleged in Paragraph XV of the complaint and that this defendant has paid no part thereof. And this defendant denies on information and belief, the truth of each and every other allegation in said Paragraph XV in the complaint contained.

Further answering, and as a first separate defense, defendant alleges:

22 Third. On information and belief, that prior to the death of Henry Van Schaick, Eugene Van Schaick assumed the management of certain property of the said Henry Van Schaick, including the property mentioned in the bond (Exhibit A annexed to the complaint); that if said property was dissipated or lost at the death of the said Henry Van Schaick as alleged in the

complaint, it was so dissipated and lost with the consent of and with the connivance of and through the affirmative acts of the said Eugene Van Schaick, and the said Eugene Van Schaick was fully cognizant of and consented to any and all acts by which said property was so dissipated or lost.

Further answering and as a second separate defense, defendant alleges:

Fourth. On information and belief, that prior to the death of the said Henry Van Schaick, he paid over to the said Eugene Van Schaick any moneys to which the said Eugene Van Schaick was then entitled, or might thereafter become entitled, in the manner set forth in Paragraphs IV and VIII of the complaint.

Further answering and as a third separate defense and set off, defendant alleges:

Fifth. On information and belief, that at the time of the death of the said Henry Van Schaick, the said Eugene Van Schaick was indebted to the said Henry Van Schaick and still is indebted to the estate of the said Henry Van Schaick in a sum amounting to more than Twenty thousand Dollars (\$20,000.), arising from moneys loaned by the said Henry Van Schaick to the said Eugene Van Schaick, and for moneys and property of the said Henry Van Schaick appropriated by the said Eugene Van Schaick to his own use.

Further answering and as a fourth separate defense, defendant alleges:

Sixth. On information and belief that prior to the 9th 23 day of May 1901 and on or about the 29th day of September 1893, the said Eugene Van Schaick and Sarah Howland Van Schaick, his wife, Henry Sybrant Van Schaick and Ada Davies Van Schaick, his wife, George Gray Van Schaick then unmarried, and the Countess Elise Bourtourline (nee Van Schaick) and Count Alexandre Bourtourline, her husband, executed and delivered to defendant's testator, a written assignment wherein and whereby they remised and released to defendant's testator, his heirs and assigns forever, all their right, title and interest in and to the real estate lands, tenements and hereditaments which were formerly of the said Jane C. Van Schaick late of the City of Albany, New York, deceased; which said instrument was recorded in the office of the Clerk of Albany County, New York, where most of said real estate was situated, on the 21st day of November 1916, in book 658 of Deeds, page 337, and also in the office of the Clerk of Rensselaer County, New York, where the rest of said real estate was situated in the 21st day of November 1916, and also in the office of the Surrogate of Albany County, New York, where the Will of the said Jane C. Van Schaick was probated, on the 21st day of November 1916; and that a true copy of said instrument is hereto annexed and marked Exhibit A and made a part hereof as if fully set forth herein.

Further answering and as a fifth separate and partial defense, defendant alleges:

Seventh. Upon information and belief, that, at the time of the alleged delivery of the instrument dated May 9, 1901 described in Paragraph X of the complaint, and as part of the same transaction, the said Eugene Van Schaick, as principal, and a corporation known

24 as the Union Surety & Guaranty Company, as surety, executed and delivered to the plaintiff a bond, a true copy of which is hereto annexed and marked Exhibit "D." That at the same time and as part of the same transaction the said Eugene Van Schaick delivered to the plaintiff five policies of Life insurance belonging to the said Van Schaick, which he had taken out on his own life and in his own name on or about June 15, 1898, in the Provident Savings Life Assurance Society of New York, being policies numbers 92981, 92982, 92983, 92984 and 92985 for \$3,000. each, all dated June 15, 1898, as security for the payment of the alleged interest in the Estate of Jane C. Van Schaick up to the sum of \$20,000. referred to in the instrument dated May 9, 1901, described in paragraph X of the complaint. That the said Eugene Van Schaick died on or about the 27th day of January, 1916, and that on or about the 21st day of February, 1916, the plaintiff received upon said life insurance policies from the Postal Life Insurance Company of New York, the successor of the said Provident Savings Life Assurance Society, the sum of \$14,934.15. That upon these policies the plaintiff claims to have paid premiums which, with interest, amounted on February 21, 1916, to \$5,871.83, leaving the sum of \$9,062.32 as the net amount received by the said plaintiff in respect to said policies.

Eighth. This defendant avers that he is entitled to set off the said sum of \$9,062.32 so received by the plaintiff against all claims of the plaintiff against this defendant as alleged in the complaint.

25 Wherefore, this defendant demands judgment that the complaint be dismissed with costs.

WILSON B. BRICE,

*Attorney for Wilson B. Brice, as Sole
Surviving Executor, etc., Defendant.*

27 Cedar Street, New York City.

26 SOUTHERN DISTRICT OF NEW YORK,
State and County of New York, ss:

Wilson B. Brice, being duly sworn, says: That he is the defendant named herein. That he has read the foregoing amended answer and knows the contents thereof and that the same is true to his own knowledge, except as to the matters therein stated to be alleged upon information and belief and that as to those matters, he believes it to be true.

WILSON B. BRICE.

Sworn to before me this 8th day of January, 1917.

MAE HAFT,

Notary Public, Bronx Co. No. 2; Bronx Register No. 820.

Certificate filed in N. Y. Co. No. 162 N. Y. Register No. 8180.
Term expires Mar. 30, 1918.

27

EXHIBIT A.

This indenture made this 29th day of September, in the year one thousand eight hundred and ninety-three, between Henry Sybrant Van Schaick, of the City of New York, and Ada Davies Van Schaick, his wife, George Gray Van Schaick, unmarried, of the City of New York, Countess Elise Boutourline (nee Van Schaick) of Florence, Italy, and Count Alexandre Boutourline, her husband, and Eugene Van Schaick, of the City of New York, and Sarah Howland Van Schaick, his wife, parties of the first part and Henry Van Schaick, of the City, County and State of New York, party of the second part:

Whereas under the last will and testament of Jane C. Van Schaick, late of the City of Albany, the party of the second part was given and devised one-half of all her real estate, lands, tenements and hereditaments which she owned or should be legally or equitably entitled to at the time of her decease, for and during the life of the said party of the second part only, and the remainder in fee simple in said half part to the descendants of the said party of the second part who shall be living at the time of her decease; and

Whereas it is deemed beneficial to the said property that it be held in fee simple, and the parties of the first part are desirous of relinquishing, conveying and assigning their vested remainder in and to said property to the party of the second part, so as to give him title in fee simple to the said property, instead of a life estate;

Now, therefore, this indenture witnesseth:

That in consideration of the premises, and of the sum of
28 One Dollar by the party of the second part to the parties of the first part in hand paid, the receipt whereof is hereby confessed and acknowledged, the parties of the first part do hereby grant, remise and release to the party of the second part all their right, title and interest in and to the real estate, lands, tenements and hereditaments which were of said Jane C. Van Schaick, late of the City of Albany, together with the appurtenances, and all the estate and rights of the said parties of the first part, to have and to hold the above granted premises unto the said party of the second part, his heirs and assigns forever.

And the said parties of the first part do covenant with the said party of the second part that they will execute or procure any further necessary assurance of the title to said premises.

In witness whereof the said parties of the first part have hereunto set their hands and seals the day and year first above written.

HENRY SYBRANT VAN SCHAICK,	[L. s.]
ADA DAVIES VAN SCHAICK,	[L. s.]
GEORGE GRAY VAN SCHAICK.	[L. s.]

Signed, sealed and delivered in the presence of

WILLIAM A. BOECKEL,

As to Henry Sybrant Van Schaick, Ada Davies Van Schaick, George Gray Van Schaick, Eugene Van Schaick and Sarah Howland Van Schaick.

G. G. VAN SCHAICK, as to

CTESSE. ELISABETH BOUTOURLINE. [L. S.]

and

COMTE. ALEXANDRE BOUTOURLINE. [L. S.]

EUGENE VAN SCHAICK. [L. S.]

SARAH HOWLAND VAN SCHAICK. [L. S.]

29 STATE OF NEW YORK,
City and County of New York, ss:

On this 29th day of September, 1893, before me personally came Henry Sybrant Van Schaick and Ada Davies Van Schaick, his wife, George Gray Van Schaick, Eugene Van Schaick and Sarah Howland Van Schaick, his wife, to me known and known to me to be the persons above named and who executed the above instrument, and duly, separately, personally acknowledged to me that they executed the same for the uses and purposes therein mentioned.

WILLIAM A. BOECKEL,
Notary Public, Kings Co.

Certificate filed in N. Y. Co.

Form 2.

STATE OF NEW YORK,
County of New York, ss:

No. 8723.

I, William F. Schneider, Clerk of the County of New York, and also Clerk of the Supreme Court for the said County, the same being a Court of Record, do hereby certify, That William A. Boeckel whose name is subscribed to the deposition or certificate of the proof or acknowledgement of the annexed instrument, and thereon written, was, at the time of taking such deposition or proof and acknowledgement, a Notary Public, acting in and for the said County, duly commissioned and sworn, and authorized by the laws of said State to take depositions and also acknowledgments and proofs of Deeds, or conveyances for land, tenements or hereditaments in said State of New York. That there is on file in the Clerk's office of the County of New York, a certified copy of his appointment and qualification as Notary Public of the County of Kings with his autograph signature. And further, that I am well acquainted with the handwriting of such Notary Public, and verily believe that the signature of said deposition, or certificate of proof or acknowledgment is genuine.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said Court and County this 7 day of April, 1915.

WM. F. SCHNEIDER, *Clerk.*

Cancelled 10c. Fed. Stamp affixed Apr. 7, 1915.

30 KINGDOM OF ITALY,
City of Florence, ss:

On this the 15th day of December, A. D. 1893, before me James Verner Long, U. S. Consul at Florence, personally appeared Countess Elisabeth Bourtourline and Count Alexandre Bourtourline, her husband, known to me and known to me to be the persons described in and who executed the within Instrument and acknowledged personally, duly, separately to me that they executed the same for the uses and to the purposes therein mentioned.

Given under my hand and Consular Seal the day and year aforesaid.

[CONSULAR SEAL.]

JAMES VERNER LONG,
U. S. Consul at Florence, Italy.

31 United States District Court for the Southern District of
New York.

THE BRAINERD, SHALER & HALL QUARRY COMPANY

against

WILSON B. BRICE, as Sole Surviving Executor of the Last Will and Testament of Henry Van Schaick, Deceased, and the American Surety Company of New York.

Third Amended Answer.

The defendant, American Surety Company of New York, by Winthrop & Stimson, its attorneys, for a third amended answer to the complaint herein, alleges:

First Defense.

I. This defendant denies any knowledge or information sufficient to form a belief as to the allegations contained in Paragraph I of the complaint.

II. This defendant admits that the defendant American Surety Company of New York is a corporation organized and existing under the laws of the State of New York and having its principal place of business in the Borough of Manhattan, City, County and State of New York, and of the Southern District of New York. This defendant denies any knowledge or information sufficient to form a belief as to the remaining allegations of said paragraph II of the complaint.

III. This defendant denies any knowledge or information sufficient to form a belief as to the allegations contained in paragraph III of the complaint.

32 IV. This defendant denies any knowledge or information sufficient to form a belief as to the allegations contained in paragraph IV of the complaint.

V. This defendant denies any knowledge or information sufficient to form a belief as to the allegations contained in paragraph V of the complaint.

VI. This defendant denies any knowledge or information sufficient to form a belief as to the allegations contained in paragraph VI of the complaint.

VII. This defendant denies any knowledge or information sufficient to form a belief as to the allegations contained in paragraph VII of the complaint.

VIII. This defendant admits that on or about February 2, 1897, there was entered a decree of distribution in the Supreme Court, in the County of Albany, in an action for a partition of certain real estate wherein John Van Schaick Oddie was plaintiff and Henry Van Schaick and others were defendants. For the contents of said decree this defendant refers to the original thereof or a duly certified copy to be produced upon the trial of this action.

This defendant admits that Henry Van Schaick, as principal, and the defendant the American Surety Company of New York, as surety, executed a bond in the sum of \$75,000, bearing date the 3rd day of February, 1897, substantially in the form a copy of which is annexed to the complaint, but for greater certainty and for the contents and effect thereof, this defendant refers to the original thereof to be produced upon the trial of this action.

Defendant denies any knowledge or information sufficient to form a belief as to the remaining allegations contained in paragraph VIII of the complaint.

IX. This defendant denies any knowledge or information sufficient to form a belief as to the allegations contained in paragraph IX of the complaint.

X. This defendant denies any knowledge or information sufficient to form a belief as to the allegations contained in paragraph X of the complaint.

XI. This defendant denies any knowledge or information sufficient to form a belief as to the allegations contained in paragraph XI of the complaint.

XII. This defendant denies any knowledge or information sufficient to form a belief as to the allegations contained in paragraph XII of the complaint.

XIII. This defendant denies any knowledge or information sufficient to form a belief as to the allegations contained in paragraph XIII of the complaint.

XIV. This defendant denies any knowledge or information sufficient to form a belief as to the allegations contained in paragraph XIV of the complaint.

XV. This defendant denies any knowledge or information sufficient to form a belief as to the allegations contained in paragraph XV of the complaint.

Second Defense.

34 XVI. This defendant alleges that simultaneously with the execution and delivery of the bond mentioned in paragraph VIII of the complaint by Henry Van Schaick, as principal, and by this defendant as surety, and in consideration thereof, and as a part of the same transaction, Eugene Van Schaick, Henry Sybrant Van Schaick and George Gray Van Schaick executed and delivered to the defendant American Surety Company of New York an instrument a copy of which is hereto annexed marked Exhibit "A" and made a part hereof as fully as though set forth at length herein.

Third Defense.

XVII. This defendant alleges that on or about the 4th day of February, 1897, Eugene Van Schaick, being as this defendant is informed and believes, the beneficial owner of the remainder interest bequeathed to him under the will of Jane C. Van Schaick in the property mentioned in the bond (Exhibit "A" annexed to the complaint), for a valuable consideration, executed and delivered to this defendant a release of all its liability to him, the said Eugene Van Schaick, in respect to its suretyship on the said bond (Exhibit "A" annexed to the complaint). A copy of said release is annexed hereto marked Schedule "A" with the same force and effect as if herein set forth at length.

35 XVIII. This defendant alleges, upon information and belief, that the assignment alleged to have been made by Eugene Van Schaick to the plaintiff, as alleged in paragraph X of the complaint, was never recorded in the office of the clerk of Albany County and was never recorded in the office of the Clerk of Rensselaer County, those being the counties in which the real estate, the proceeds of which are alleged to have constituted the fund referred to in the bond (Exhibit "A" attached to the complaint) is alleged to have been situated, and was never recorded in the office of the Surrogate's Court of Albany County, by which letters testamentary had been issued on the estate of Jane C. Van Schaick, and that the plaintiff did not at any time notify the said Henry Van Schaick of the said assignment from Eugene Van Schaick to the plaintiff and that said Henry Van Schaick had no knowledge of said assignment.

This defendant further alleges that the plaintiff did not in any way notify this defendant at any time prior to the 9th day of October, 1915, of the assignment from said Eugene Van Schaick to the plaintiff alleged in paragraph X of the complaint, and that this defendant, prior to said 9th day of October, 1915, did not have any notice of said assignment from the plaintiff or from any other person, or any knowledge that the plaintiff claimed any interest in the estate of

Jane C. Van Schaick, or in the share of Eugene Van Schaick therein, by reason of said assignment alleged in paragraph X of the complaint.

Fourth Defense and Set Off.

XIX. This defendant alleges that on or about the 25th day of March, 1897, for a good and valuable consideration, Eugene Van Schaick, Henry Sybrant Van Schaick and George Gray Van Schaick executed and delivered to this defendant a certain instrument bearing date on that day. In and by said instrument said Eugene Van Schaick, Henry Sybrant Van Schaick and George Gray Van Schaick covenanted and agreed with said American Surety Company as follows:

36 "That said parties shall and will at all times indemnify, and keep indemnified, and save harmless the said Company from and against all loss, damages, costs, charges, counsel fees and expense whatsoever which said Company shall or may, for any cause, at any time sustain or incur by reason or in consequence of said company having executed said instrument; and do further covenant and agree to pay to said Company and its representatives all damages for which said Company or its representatives shall become responsible upon the said bond before said Company or its representatives shall be compelled to pay the same, any sum so paid, however, to be applied to the payment of such damages; and in case any suit, action, or other proceeding shall be commenced or notice served on said parties of the first part in any manner relating to or growing out of the matter or business for or on account of which the aforesaid instrument was required to be executed, immediate notice thereof shall be given to said Company at its office in New York."

A full copy of said instrument is hereto annexed marked Exhibit "B" and made a part hereof as fully as though set forth at length herein.

XX. This defendant alleges that said agreement (Exhibit "B") now is and was in all respects valid and subsisting at the time of the alleged assignment from Eugene Van Schaick to this plaintiff alleged in paragraph X of the complaint.

XXI. This defendant repeats and re-alleges the allegations contained in paragraph 18 of this answer with the same force and effect as if the same had been made a portion of this defense.

XXII. This defendant avers that it is entitled to set off against any claim of the plaintiff as assignee of Eugene Van Schaick under the assignment alleged in paragraph X of the complaint, its claim against Eugene Van Schaick under the said agreement dated March 25, 1897.

Fifth Defense.

37 XXIII. This defendant alleges that at the time of the execution and delivery by it of the bond (Exhibit "A" annexed to the complaint) the said Eugene Van Schaick represented

to this defendant that he, as one of the children of Henry Van Schaick was entitled to an interest in remainder (Subject to being divested in case of his death before the death of said Henry Van Schaick) in the property mentioned in said bond.

XXIV. This defendant alleges that if it be determined contrary to the information and belief of this defendant that Eugene Van Schaick was not the beneficial owner of the remainder interest bequeathed to him under the will of Jane C. Van Schaick in the property mentioned in the bond (Exhibit "A" annexed to the complaint) at the time of the execution and delivery of said bond, then said representations so made to this defendant were made by said Eugene Van Schaick falsely and fraudulently and for the purpose of inducing this defendant to rely on them and to execute the said bond, and the said Eugene Van Schaick fraudulently concealed from this defendant that he had made any assignment to his wife Sarah Van Schaick as alleged in paragraph VII of the Complaint or to any other person, and this defendant relying on said representations of said Eugene Van Schaick accepted the release executed by said Eugene Van Schaick, dated February 4, 1897 (a copy of which is annexed to this answer as Exhibit "A") and executed and delivered the said bond (Exhibit "A" annexed to the complaint).

XXV. This defendant repeats and realleges the allegations in paragraph XVIII of this answer with the same force and effect as if set forth at length as a part of this defense.

38

Sixth Defense.

XXVI. This defendant alleges that at the time of the execution and delivery by it of the bond (Exhibit "A" annexed to the complaint) and at the time of the execution and delivery of the said release (Exhibit "A" hereto annexed) and at the time of the execution and delivery of the said Indemnity Agreement (Exhibit "A" hereto annexed) the said Eugene Van Schaick represented to this defendant that he, as one of the children of Henry Van Schaick was entitled to an interest in remainder (Subject to being divested in case of his death before the death of said Henry Van Schaick) in the property mentioned in said bond.

XXVII. This defendant alleges that if it be determined contrary to the information and belief of this defendant that Eugene Van Schaick was not the beneficial owner of the remainder interest bequeathed to him under the will of Jane C. Van Schaick in the property mentioned in the bond (Exhibit "A" annexed to the complaint) at the time of the execution and delivery of said bond, then said representations so made to this defendant were made by said Eugene Van Schaick falsely and fraudulently and for the purpose of inducing this defendant to rely upon them and to permit the said Henry Van Schaick until his death to have full and sole control of the property mentioned in said bond (Exhibit "A" annexed to complaint) and to omit to insist on and demand as it was its custom in similar cases joint control with the said Henry Van Schaick

of the property mentioned in said bond as a condition of the issuance of its bond and the continuance of its liability thereunder, and the said Eugene Van Schaick fraudulently concealed from this defendant that he had made any assignment to his wife Sarah Van Schaick as alleged in paragraph VII of the complaint or to any other person, and this defendant relying on said representations of said Eugene Van Schaick accepted the release executed by said Eugene Van Schaick, dated February 4, 1897 (a copy of which is annexed to this answer as Exhibit "A") and accepted the indemnity agreement executed by said Eugene Van Schaick, dated March 25, 1897, (a copy of which is annexed to this answer as Exhibit "B") and relying on said representations and on said agreements, this defendant permitted the said Henry Van Schaick until his death to have full and sole control of the property mentioned in said bond (Exhibit "A" annexed to the complaint) and omitted to insist on and demand, as it was its custom in similar cases, joint control jointly with the said Henry Van Schaick of the property mentioned in said bond as a condition of the issuance of its bond and the continuance of its liability thereunder.

XXVIII. This defendant repeats and realleges the allegations contained in paragraph XVIII of this answer with the same force and effect as if set forth at length as a part of this defense.

Seventh Defense.

XXIX. This defendant alleges, on information and belief, that prior to the death of Henry Van Schaick the said Eugene Van Schaick assumed the management of certain property of his father, the said Henry Van Schaick, including the property mentioned in the bond (Exhibit "A" annexed to the complaint): that if the said property was dissipated or lost at the death of said Henry Van Schaick, as alleged in said complaint, it was so dissipated and lost with the consent of and with the connivance of and through the affirmative acts of the said Eugene Van Schaick and the said Eugene Van Schaick was fully cognizant of and consented to any and all acts by which said property mentioned in the bond (Exhibit "A" annexed to the complaint) was so dissipated or lost.

XXX. This defendant repeats and realleges the allegation contained in paragraph XVIII of this answer with the same force and effect as if set forth in full as a part of this defense.

Eighth Defense.

XXXI. This defendant alleges, upon information and belief, that said Henry Van Schaick, during his lifetime, accounted to the said Eugene Van Schaick for the property mentioned in the bond (Exhibit "A" annexed to the complaint) and transferred and paid over to the said Eugene Van Schaick the portion of said property to

which the said Eugene Van Schaick was entitled or which the said Eugene Van Schaick or his assigns would otherwise have become entitled under the terms of the decree of distribution mentioned in said bond, to receive upon the death of the said Henry Van Schaick.

XXXII. This defendant repeats and realleges the allegations contained in paragraph XVIII of this answer with the same force and effect as if set forth at length as a part of this defense.

41

Ninth Defense.

XXXIII. This defendant alleges upon information and belief that Henry Van Schaick, prior to his death, loaned to the said Eugene Van Schaick sums of money in excess of \$20,000 and that the said Eugene Van Schaick appropriated to his own use moneys and property of the said Henry Van Schaick in excess of \$20,000 and that at the time of the death of said Henry Van Schaick the said Eugene Van Schaick was indebted to the said Henry Van Schaick and still is indebted to the estate of said Henry Van Schaick in a sum amounting to more than \$20,000.

XXXIV. This defendant repeats and realleges the allegations contained in paragraph XVIII of this answer with the same force and effect as if set forth at length, as a part of this defense.

Tenth Defense.

XXXV. Upon information and belief, this defendant denies the allegations contained in paragraph VII of the complaint.

XXXVI. Upon information and belief, this defendant denies the allegations of paragraphs IX and X of the complaint.

XXXVII. This defendant alleges upon information and belief that, on or about the 29th day of September, 1893, by deed bearing date on that day, the said Eugene Van Schaick and Sarah Howland Van Schaick, his wife, and Henry Sybrant Van Schaick and Ada Davies Van Schaick, his wife, George Gray Van Schaick, then unmarried, and the Countess Elise Boutourline (née Van Schaick) and Count Alexandre Boutourline, her husband, for a valuable consideration duly granted, remised and released to Henry Van Schaick, his heirs and assigns, forever, all their right, title and interest in and to the real estate, lands, tenements and hereditaments which were formerly of the said Jane C. Van Schaick, late of the City of Albany, New York, deceased; that said deed was duly recorded in the clerk's office of Albany County, New York, where most of said real estate was situated, on the 21st day of November, 1916, in book 658 of deeds, page 337, and in the clerk's office of Rensselaer County, New York, where the rest of said real estate was situated, on the 21st day of November, 1916, and in the office of the Surrogate of Albany County, New York, where the will of the said Jane C. Van Schaick was probated, on the 21st day of November, 1916, and that a true copy of said last mentioned deed is hereto annexed and marked Exhibit "C" and made a part hereof as if fully set forth herein.

XXXVIII. This defendant repeats and realleges the allegations contained in paragraph XVIII of this answer with the same force and effect as if set forth at length as a part of this defense.

Eleventh and Partial Defense.

XXXIX. This defendant repeats and realleges the allegations in Paragraph XIX of this answer with the same force and effect as if the same had been made a portion of this defense.

XL. This defendant alleges, upon information and belief, that, at the time of the alleged delivery of the instrument dated May 9, 1901, described in Paragraph X of the complaint, and as part
43 of the same transaction, the said Eugene Van Schaick, as principal, and a corporation known as the Union Security & Guaranty Company, as surety, executed and delivered to the plaintiff a bond, a true copy of which is hereto annexed and marked Exhibit "D." That at the same time and as part of the same transaction the said Eugene Van Schaick delivered to the plaintiff five policies of life insurance belonging to the said Van Schaick, which he had taken out on his own life and in his own name on or about June 15, 1898, in the Provident Savings Life Assurance Society of New York, being policies numbers 92981, 92982, 92983, 92984 and 92985 for \$3,000 each, all dated June 15, 1898, as security for the payment of the alleged interest in the Estate of Jane C. Van Schaick up to the sum of \$20,000 referred to in the instrument dated May 9, 1901, described in paragraph X of the complaint and in Exhibit "D" hereto annexed. That the said Eugene Van Schaick died on or about the 27th day of January, 1916, and that on or about the 21st day of February, 1916, the plaintiff received upon said life insurance policies from the Postal Life Insurance Company of New York, the successor of the said Provident Savings Life Assurance Society, the sum of \$14,934.15. That upon these policies the plaintiff claims to have paid premiums which, with interest, amounted on February 21, 1916, to \$5,871.83, leaving the sum of \$9,062.32 as the net amount received by the said plaintiff in respect to said policies.

XLI. This defendant avers that it is entitled to set off the said
44 sum of \$9,062.32 so received by the plaintiff against all claims of the plaintiff against this defendant by reason of this defendant's bond dated the 3rd day of February, 1897, referred to in the complaint herein.

Wherefore, this defendant demands that the complaint herein be dismissed with costs.

WINTHROP & STIMSON,
*Attorneys for Defendant American
Surety Company of New York.*

Office & Post Office Address: 32 Liberty Street, Borough of Manhattan, New York City, N. Y.

45 STATE OF NEW YORK,
 County of New York, ss:

E. F. Watson, being duly sworn, deposes and says: that he is the Vice-President of the American Surety Company of New York, the defendant in this action; that he has read the foregoing amended answer and knows the contents thereof and that the same is true to his knowledge except as to the matters therein stated to be alleged on information and belief and as to those matters he believes it to be true.

Deponent further says that the reason why this verification is not made by the defendant is that it is a corporation; that this defendant is an officer thereof, to wit: the Vice-President, and that he is familiar with all the facts set forth in the answer; that the ground of his belief as to all matters not stated upon his knowledge is information which he has acquired in the course of the performance of his duties as Vice-President of the said American Surety Company of New York.

E. F. WATSON.

Sworn to before me this 5th day of January, 1917.

HORACE P. HOLLISTER,
Notary Public, Westchester County.

Certificate filed in New York County. New York County No. 167.
New York Register's No. 7166.

My Commissioner expires March 30, 1917.

46 EXHIBIT "A."

To All to Whom These Presents Shall Come or May Concern, Greeting:

Know ye, that we, Henry Sybrant Van Schaick, George Gray Van Schaick & Eugene Van Schaick for and in consideration of the sum of One Dollar lawful money of the United States of America, to us in hand paid by The American Surety Company, the receipt whereof is hereby acknowledged, have remised, released and forever discharged, and by these Presents do for ourselves, our heirs, executors and administrators, remise, release and forever discharge the said The American Surety Company, its successors and assigns, of and from all, and all manner of action and actions, cause and causes of actions, suits, debts, dues, sums of money, accounts, reckonings, bonds, bills, specialties, covenants, contracts, controversies, agreements, promises, variances, trespasses, damages, judgments, extents, executions, claims and demands whatsoever in law or in equity, which against The American Surety Company we ever had, now have or which heirs, executors or administrators, hereafter can, shall or may have for, upon or by reason of any matter, cause or thing what-

soever from the beginning of the world to the day of the date of these presents & more particularly because of their suretyship on the bond of Henry Van Schaick as life-tenant of certain property taken under the last will and testament of Jane C. Van Schaick, deceased.

In witness whereof, we have hereunto set our hands and seals the 4th day of February in the year of our Lord one thousand eight hundred and ninety-seven.

HENRY SYBRANT VAN SCHAICK. [L. s.]

GEORGE GRAY VAN SCHAICK. [L. s.]

EUGENE VAN SCHAICK. [L. s.]

Sealed and Delivered in the Presence of

WILLIAM A. BOECKEL.

47 STATE OF NEW YORK,
City of New York,
County of New York, ss:

On this 4 day of February in the year one thousand eight hundred and ninety-seven before me personally came Henry Sybrant Van Schaick, George Gray Van Schaick and Eugene Van Schaick to me known, and known to me to be the individuals described in, and who executed the foregoing instrument, and severally acknowledged that they executed the same.

WILLIAM A. BOECKEL,
Notary Public, Kings Co.

Certificate filed in N. Y. Co.

48 EXHIBIT "B."

This Agreement, made this 25th day of March, in the year one thousand eight hundred and ninety-seven, by and between Henry Sybrant Van Schaick, George Gray Van Schaick, Eugene Van Schaick, parties of the first part, and the American Surety Company of New York, party of the second part, witnesseth:

Whereas, at the special instance and request of the parties of the first part, and on the security hereof, the American Surety Company of New York has become surety of Henry Van Schaick on a certain bond of even date herewith, for the sum of Seventy-five thousand dollars in an action in the Supreme Court of the County of Albany and State of New York wherein John Van Schaick Oddie is plaintiff and Henry Van Schaick and others are defendants a copy of which bond is hereto annexed, marked "A" and forms a part of this agreement.

Now, therefore, in consideration of the premises and of the sum of one dollar in hand paid to said parties of the first part, the receipt whereof is hereby acknowledged the said parties of the first part hereby agree and bind themselves and each of their heirs and assigns, jointly and severally, as follows, to wit:

That said parties shall and will at all times indemnify, and keep indemnified, and save harmless the said Company from and against all loss, damages, costs, charges, counsel fees and expense whatsoever which said Company shall or may, for any cause at any time, sustain or incur by reason or in consequence of said Company having executed said instrument; and do further covenant and agree to pay to said Company and its representatives all damages for which
 49 said Company or its representatives shall become responsible upon the said bond before said Company or its representatives shall be compelled to pay the same, any sum so paid, however, to be applied to the payment of such damages; and in case any suit, action or other proceeding shall be commenced or notice served on said parties of the first part in any manner relating to or growing out of the matter or business for or on account of which the aforesaid instrument was required to be executed, immediate notice thereof shall be given to said Company at its office in New York.

In witness whereof, the said parties have hereunto set their hands and seals the day and year first above written.

HENRY SYBRANT VAN SCHAICK. [SEAL.]

GEORGE GRAY VAN SCHAICK. [SEAL.]

EUGENE VAN SCHAICK. [SEAL.]

Signed, sealed and delivered in the presence of
 WILLIAM A. BOECKEL.

STATE OF NEW YORK,
County of New York, ss:

On this 25th day of March, one thousand eight hundred and ninety-seven before me personally came Henry Sybrant Van Schaick, George Gray Van Schaick, Eugene Van Schaick to me known, and known to me to be the individuals described in and who executed the foregoing and within instrument, and they severally duly acknowledged to me that they had executed the same.

[SEAL.]

WILLIAM A. BOECKEL,
Notary Public, Kings Co.

Certificate filed in N. Y. Co.

This indenture made this 29th day of September, in the year One thousand eight hundred and ninety-three, between Henry Sybrant Van Schaick, of the City of New York, and Ada Davies Van Schaick, his wife, George Gray Van Schaick, unmarried, of the City of New York, Countess Elise Boutourline (nee Van Schaick) of Florence, Italy, and Count Alexandre Boutourline, her husband, and Eugene Van Schaick of the City of New York, and Sarah Howland Van Schaick, his wife, parties of the first part and Henry Van Schaick, of the City, County and State of New York, party of the second part:

Whereas under the last will and testament of Jane C. Van Schaick, late of the City of Albany, the party of the second part was given and devised one-half of all her real estate, lands, tenements and hereditaments which she owned or should be legally or equitably entitled to at the time of her decease, for and during the life of the said party of the second part only, and the remainder in fee simple in said half part of the descendants of the said party of the second part who shall be living at the time of her decease; and

Whereas it is deemed beneficial to the said property that it be held in fee simple, and the parties of the first part are desirous of relinquishing, conveying and assigning their vested remainder in and to said property to the party of the second part, so as to give him title in fee simple to the said property, instead of a life estate;

Now, therefore, this indenture witnesseth:

That in consideration of the premises, and of the sum of
51 One Dollar by the party of the second part to the parties of the first part in hand paid, the receipt whereof is hereby confessed and acknowledged, the parties of the first part do hereby grant remise and release to the party of the second part all their right, title and interest in and to the real estate, lands, tenements and hereditaments which were of said Jane C. Van Schaick, late of the City of Albany, together with the appurtenances, and all the estate and rights of the said parties of the first part, to have and to hold the above granted premises unto the said party of the second part, his heirs and assigns forever.

And the said parties of the first part do covenant with the said party of the second part that they will execute or procure any further necessary assurance of the title to said premises.

In witness whereof the said parties of the first part have hereunto set their hands and seals the day and year first above written.

HENRY SYBRANT VAN SCHAICK,	[L. s.]
ADA DAVIES VAN SCHAICK,	[L. s.]
GEORGE GRAY VAN SCHAICK.	[L. s.]

Signed, sealed and delivered in the presence of:

WILLIAM A. BOECKEL,

As to Henry Sybrant Van Schaick, Ada Davies Van Schaick, George Gray Van Schaick, Eugene Van Schaick and Sarah Howland Van Schaick.

G. G. VAN SCHAICK, as to

CTESSE. ELISABETH BOUTOURLINE.	[L. s.]
and	
COMTE ALEXANDRE BOUTOURLINE.	[L. s.]
EUGENE VAN SCHAICK.	[L. s.]
SARAH HOWLAND VAN SCHAICK.	[L. s.]

52 STATE OF NEW YORK,
 City and County of New York, ss:

On this 29th day of September, 1893, before me personally came Henry Sybrant Van Schaick and Ada Davies Van Schaick, his wife, George Gray Van Schaick, Eugene Van Schaick and Sarah Howland Van Schaick, his wife, to me known and known to me to be the persons above named and who executed the above instrument, and duly, separately, personally acknowledged to me that they executed the same for the uses and purposes therein mentioned.

WILLIAM A. BOECKEL,
Notary Public, Kings Co.

Certificate filed in N. Y. Co.

Form 2.

STATE OF NEW YORK,
 County of New York, ss:

No. 8723.

I, William F. Schneider, Clerk of the County of New York, and also Clerk of the Supreme Court for the said County, the same being a Court of Record, do hereby certify, That

William A. Boeckel, whose name is subscribed to the deposition or certificate of the proof or acknowledgment of the annexed instrument, and thereon written, was, at the time of taking such deposition or proof and acknowledgement, a Notary Public, acting in and for the said County, duly commissioned and sworn, and authorized by the laws of said State to take depositions and also acknowledgments and proofs of Deeds, or conveyances for land, tenements or hereditaments in said State of New York. That there is on file in the Clerk's office of the County of New York, a certified copy of his appointment and qualification as Notary Public of the County of Kings with his autograph signature. And further, that I am well acquainted with the handwriting of such Notary Public, and verily believe that the signature of said deposition, or certificate of proof or acknowledgment is genuine.

In testimony whereof, I have hereunto set my hand and affixed the seal of the said Court and County this 7 day of April, 1915.

WM. F. SCHNEIDER, *Clerk.*

Cancelled 10¢ Fed. Stamp affixed Apr. 7, 1915.

53 KINGDOM OF ITALY,
 City of Florence, ss:

On this the 15th day of December, A. D. 1893, before me James Verner Long, U. S. Consul at Florence, personally appeared Coun-

tess Elisabeth Boutourline and Count Alexandre Boutourline, her husband, known to me and known to me to be the persons described in and who executed the within Instrument and acknowledged personally duly, separately to me that they executed the same for the uses and to the purposes therein mentioned.

Given under my hand and Consular Seal the day and year aforesaid.

[CONSULAR SEAL.]

JAMES VERNER LONG,
U. S. Consul at Florence, Italy.

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EXHIBIT "D."

Know all men by these presents, that we, Eugene Van Schaick of the City of New York, as principal, and The Union Surety and Guaranty Company, a corporation duly organized and existing under and pursuant to the laws of the State of Pennsylvania, and duly qualified and licensed to do business in the State of New York, and having its principal office at No. 135 Broadway, in the City of New York, as surety, are held and firmly bound unto The Brainerd, Shaler and Hall Quarry Company, a corporation duly organized and existing under the laws of the State of Connecticut, in the sum of Twenty thousand (20,000) Dollars, lawful money of the United States, to be paid to the said The Brainerd, Shaler and Hall Quarry Company, its successors or assigns, for which payment well and truly to be made we bind ourselves, our and each of our heirs, executors, administrators, successors and assigns jointly and severally, firmly by these presents.

Sealed with our seals. Dated the 9th day of May, in the year one thousand nine hundred and one.

Whereas, under the Will of Jane C. Van Schaick, late of the City of Albany, there was left to Henry Van Schaick as life tenant, the sum of sixty seven thousand one hundred and eighty-four and 87/100 (67,184.87) Dollars or thereabouts, with the remainder to his descendants who might be alive at the time of his death, which sum of money thereafter came into and now is in the possession of the said Henry Van Schaick; and

Whereas, Eugene Van Schaick, one of the said descendants, has sold, assigned, set over and transferred, or has caused to be assigned, set over and transferred, absolutely to the said The Brainerd, Shaler & Hall Quarry Company an interest in said remainder up to the amount or sum of twenty thousand (20,000) Dollars;

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Now Therefore, the condition of this obligation is such that if the said Henry Van Schaick shall during his life time safely keep and preserve the said sum of Twenty thousand (20,000) Dollars, part of said principal sum of Sixty-seven Thousand, one hundred eighty-four 87/100 (67,184.87) Dollars, and if said sum of Twenty Thousand (20,000) Dollars shall thereafter be duly accounted for and paid over as provided for in the decree adjudicating the possession of said principal sum of Sixty-seven Thou-

sand One hundred Eighty-four 87/100 (67,184.87) Dollars, to the said Henry Van Schaick during his life, which decree bears date the first day of February 1897, and was entered on or about the third day of February, 1897, in the County of Albany, in an action wherein John Van Schaick Oddie was plaintiff and said Henry Van Schaick and others were defendants, then this obligation is to be void, otherwise to remain in full force, virtue and effect.

[L. s.] THE UNION SURETY AND GUARANTY CO.
A. MARCUS, *President*.

Attest:

J. J. MASON, *Secretary*.

EUGENE VAN SCHAICK. [L. s.]

STATE OF NEW YORK,
County of New York, ss:

On this 9th day of May, in the year one thousand nine hundred and one, before me personally came Eugene Van Schaick to me known and known to me to be the person described in and who executed the foregoing instrument and acknowledged to me that he executed the same.

[SEAL.]

HENRY SCHLOSSER,
Notary Public, No. 262, New York County.

50 cts. Int. Rev. Stamp cancelled.

56 STATE, CITY, AND COUNTY OF NEW YORK, ss:

On this 9th day of May, A. D. 1901, before me personally appeared A. Marcus, to me known, who being by me duly sworn, did depose and say: That he resided in Englewood, New Jersey, that he is the President of The Union Surety and Guaranty Company, the Corporation described in and who executed the above instrument; that he knew the seal of said corporation; that the seal affixed to said instrument was such corporate seal; that it was so affixed by order of the Board of Directors of said corporation, and that he signed his name thereto by like order; and that the liabilities of said corporation do not exceed its assets, as ascertained in the manner provided by Section 3, Chapter 720 of the New York Session Laws of 1893.

And the said A. Marcus, further said, that he was acquainted with J. J. Mason, and knew him to be the Secretary of said Corporation; that the signature of said J. J. Mason, subscribed to said instrument is in the genuine handwriting of said J. J. Mason, and was thereto subscribed by the like order of said Board of Directors and in the presence of him, the said A. Marcus.

[SEAL.]

HENRY SCHLOSSER,
Notary Public, No. 262, New York County.

57 At a Stated Term of the District Court of the United States for the Southern District of New York, Held at the Federal Post-Office Building, in the City and County of New York, on the 17th Day of April, 1917.

Present: Honorable Julian W. Mack, Judge.

THE BRAINERD, SHALER & HALL QUARRY COMPANY, Plaintiff,
against

WILSON B. BRICE, as Sole Surviving Executor of the Last Will and Testament of Henry Van Schaick, Deceased, and The American Surety Company of New York, Defendants.

A motion having been made on behalf of both defendants in this action, when the same came on to be tried before this Court, for the dismissal of the action on the ground that the District Court of the United — has not cognizance of the same and the Court having allowed in open court amendment of the complaint by attaching thereto and making a part thereof a certain decree or order of the Supreme Court of the State of New York, Albany County, entered February 2, 1897, in an action entitled J. V. S. Oddie, plaintiff, against Henry Van Schaick and others, defendants,

Now, after hearing Bronson Winthrop, Esq., of counsel for the defendant The American Surety Company of New York, and Wilson B. Brice, Esq., attorney for the defendant W. B. Brice as sole surviving Executor under the last Will of Henry Van Schaick, 58 deceased, in support of said motion, and Edwin D. Worcester, Esq., of counsel for the plaintiff, in opposition thereto, it is, on motion of Winthrop & Stimson, attorneys for the defendant The American Surety Company of New York, and W. B. Brice, attorney for W. B. Brice as Executor, &c.,

Ordered that this action be and the same is hereby dismissed.

JULIAN W. MACK, *U. S. C. J.*

59 United States District Court, Southern District of New York.

THE BRAINERD, SHALER & HALL QUARRY CO., Plaintiff,
against

WILSON B. BRICE as Sole Surviving Executor of the Last Will and Testament of Henry Van Schaick, Deceased, and the American Surety Company of New York, Defendants.

This action having come on for trial before this court on the 12th day of April, 1917, and a motion having been made on behalf of both defendants at that time for the dismissal of this action on the ground that the District Court of the United States has not cognizance of the same and, on motion of Winthrop & Stimson, attorneys for the defendant the American Surety Company of New York, and W. B.

Brice, attorney for W. B. Brice, as Executor, &c., the court having ordered by order dated April 17, 1917, that this action be dismissed.

Now, on motion of Winthrop & Stimson, attorneys for the defendant American Surety Company, and W. B. Brice, attorney for W. B. Brice, as Executor, &c., it is

Adjudged that this action be and the same hereby is dismissed.

Dated, April 26, 1917.

ALEX GILCHRIST, JR., *Clerk.*

60 District Court of the United States, Southern District of New York.

THE BRAINERD, SHALER & HALL QUARRY COMPANY, Plaintiff,
against

WILSON B. BRICE as Sole Surviving Executor of the Last Will and Testament of Henry Van Schaick, Deceased, and The American Surety Company, Defendants.

Bill of Exceptions.

Be it remembered that afterwards, to wit, on the 12th day of April, 1917, at a stated term of the Court, held in the Borough of Manhattan, City and State of New York, in the said Southern District of New York, before the Hon. Julian W. Mack, District Judge, the issues joined in this action as shown in the pleadings herein came on to be tried. The following appearances were made:

GEORGE MURRAY BROOKS,
Attorney for Plaintiff.

EDWIN D. WORCESTER,
Of Counsel.

WINTHROP & STIMSON,
*Attorneys for Defendant The American
Surety Company of New York.*

BRONSON WINTHROP AND
C. T. PAYNE,
Of Counsel.

WILSON B. BRICE,
Defendant in Person.

A jury was duly empaneled and sworn.

Thereupon Mr. Winthrop on behalf of the defendant, American Surety Company of New York, moves on the pleadings to dismiss the complaint on the ground that the District Court of the United States has no jurisdiction under Section 24, Subdivision 1, of the Federal

61 Code because the plaintiff in this action sues by virtue of an assignment from one Eugene Van Schaick, and the complaint shows that the said Eugene Van Schaick was a resident and citizen of the State of New York, the State of which both defendants are residents and citizens.

Thereupon the defendant, Wilson B. Brice, makes a like motion on his own behalf.

For the purposes of these motions it is conceded that the plaintiff is a citizen of the State of Connecticut and that both of the defendants are citizens of the State of New York, and that the said Eugene Van Schaick was a citizen of the State of New York.

Mr. Worcester for the plaintiff moved that the order or decree (referred to in the complaint) for the distribution of the proceeds of the sales in the partition action brought by one Oddie against Henry Van Schaick be deemed to have been put in evidence by the plaintiff as a part of the record on which the motions to dismiss will be considered. This motion was granted. A copy of the said order or decree is hereto annexed marked "Schedule A."

The motions to dismiss the complaint were then opposed by the plaintiff and due argument thereon was made by counsel for the respective parties. The court then granted said motions to dismiss and counsel for the plaintiff noted an exception to such ruling.

Wherefore the counsel for the plaintiff insisted that the learned Court erred in dismissing the complaint for lack of jurisdiction and erred in refusing to maintain jurisdiction of the claim set forth in the complaint; and prayed and does now pray that this bill of exceptions be settled and sealed, and it is hereby settled and sealed accordingly.

April 1, 1918.

JULIAN W. MACK,
U. S. Circ. Judge.

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SCHEDULE A.

At a Special Term of the Supreme Court of the State of New York, Held in and for the County of Albany, at Chambers, in the City of Albany, upon the 1st Day of February, 1897.

Present: Mr. Justice Alden Chester.

JOHN VAN SCHAICK ODDIE, Plaintiff,
against

HENRY VAN SCHAICK, HENRY SYBRANT VAN SCHAICK, and ADA J. VAN SCHAICK, His Wife; George Gray Van Schaick, Elizabeth Boutourline, Dimitri Boutourline, Vasili Boutourline, George Boutourline, Elise Boutourline, Aurore Boutourline, Eugene Van Schaick, and Sarah H. Van Schaick, His Wife; Engenia Brodhead, Josephine Bloodgood, Robert F. Bloodgood, and Eloise P. Bloodgood, His Wife; Elizabeth Van Schaick Winthrop, Helen F. Oddie, Wife of John Van Schaick Oddie; Robert Fanshawe Bloodgood, and Josephine Bloodgood, as Executor and Executrix of the Last Will of Emily A. Bloodgood, Deceased, Defendants.

Marcus T. Hun, the Referee named in the interlocutory judgment, made and entered in this action upon the 27th day of October, 1896,

having made and filed in the office of the Clerk of the City and County of Albany a supplemental report, bearing date the 22nd day of January, 1897, whereby it appears, among other things, that pursuant to the directions to the said Referee given, in and by the final judgment in this action, bearing date the 5th day of December, 1896, he has executed and delivered to the several purchasers of the premises sold by him as Referee deeds of the said premises purchased by them respectively, upon their complying with the terms and conditions of said sales, and has received from all of said purchasers the purchase money of the premises, mentioned in the

63 said Referee's former report of sale herein, bearing date the 20th day of November, 1896; that the said Referee has let the respective purchasers into the possession of the premises so purchased by them; that the said Referee has paid out of the proceeds of the said sale the costs and expenses of the sale, including all taxes, assessments, quit-rents or water rates which on November 24th, 1896, the day of sale, were liens upon the premises sold; that he has retained his own fees, expenses and commissions for making such sale and ascertaining and reporting upon the distribution of the proceeds of said sale as specified in said final judgment; that he has paid to the several attorneys in this action the amount of the costs and disbursements in this action awarded to the several parties hereto, and also the several allowances made to the several attorneys in this action; that he has deposited in the Albany Savings Bank pursuant to said final judgment sums aggregating eighty-eight thousand four hundred and four dollars and seventy-four cents (\$88,404.74), being the balance of the cash proceeds of the said sales remaining after making the payment stated in the said report; that the defendants Eloise P. Bloodgood, wife of the defendant Robert F. Bloodgood, and Helen F. Oddie, wife of the plaintiff John Van Schaick Oddie, have severally executed and filed with the Clerk of Albany County releases to their respective husbands of their inchoate right of dower in the property sold in this action; that the net proceeds of the said sales so reported by the said Referee as aforesaid after deducting all of the said expenses of sale, and the costs of this action as shown by his said report, are the sum of one hundred and thirty-four thousand three hundred and sixty-nine dollars and seventy-four cents (\$134,369.74) comprised as follows:

64	Cash on deposit in Albany Savings Bank.....	\$88,404.74
	Bonds and mortgages charged on portions of the property sold	34,465.00
	Property purchased by Eugenia Brodhead, Josephine Bloodgood and Robert F. Bloodgood, with which their share of the proceeds is to be charged.....	11,500.00
	Total	<hr/> \$134,369.74

And this action coming on to be heard upon the aforesaid report of the said Referee, and on rehearing and filing the annexed contents

to the entry of this order by the attorneys for all of the adult parties appearing in this action, and of the guardian ad litem for all of the infant defendants, (subject to the approval of the Court) and on motion of Frederic de P. Foster, attorney for the plaintiff, it is

Ordered, That the said sum of one hundred and thirty-four thousand three hundred and sixty-nine dollars and seventy-four cents (\$134,369.74), the net proceeds of the said sale, be divided, distributed and paid over by the said Marcus T. Hun to and among the several parties to this action who are entitled to the same as hereinafter provided and directed, that is to say: One-eighth of said net proceeds, or the sum of sixteen thousand seven hundred and ninety-six dollars and twenty-one cents (\$16,796.21) belongs to the plaintiff, John V. S. Oddie, (his wife, the defendant Helen F. Oddie, having duly released her inchoate right of dower in the said real property unto her said husband), but the said share of the plaintiff is subject to the mortgage lien thereon held by Sarah A. Sands, upon which there is now due the principal sum of two thousand five hundred

dollars (\$2,500) with interest thereon from the 1st day of November, 1896, at the rate of six per cent per annum, and the total amount due on said mortgage upon the 22nd day of January, 1897, the date of the said report, is the sum of two thousand five hundred and thirty-three dollars and seventy-five cents (\$2,533.75) which amount shall be first paid by the said Referee out of the said share to the said Sarah A. Sands, upon her executing, acknowledging and delivering to the said Referee a Proper satisfaction of the said mortgage, and thereafter the balance of the said share then remaining, namely, the sum of fourteen thousand two hundred and sixty-two dollars and forty-six cents (\$14,262.46) shall be paid in cash to the said plaintiff John V. S. Oddie.

One-eighth of said net proceeds, or the sum of sixteen thousand seven hundred and ninety-six dollars and twenty-two cents (\$16,796.22) belongs to the defendant Elizabeth Van Schaick Winthrop, and said sum shall be paid to her as follows: The sum of fourteen thousand one hundred and thirty-six dollars and twenty-two cents (\$14,136.22) thereof shall be paid to her in cash, and the balance, to-wit, two thousand six hundred and sixty dollars (\$2,660) shall be paid to her by the assignment to her by said Referee of an undivided one half interest in the bond and mortgage executed to said Referee by John Hoy, to secure the sum of five thousand three hundred and twenty dollars (\$5,320) which said undivided interest in said bond and mortgage said Elizabeth Van Schaick Winthrop has consented to accept in lieu of cash for an equal amount.

One-sixteenth of said net proceeds, or the sum of eight thousand three hundred and ninety-eight dollars and twelve cents (\$8,393.12), belongs to the defendant Eugenia Brodhead, but her said share should be charged with two eighths of the sum of eleven thousand five hundred dollars (\$11,500), the value of the property purchased by her and by Josephine Bloodgood and Robert F. Bloodgood as tenants in common, viz: The sum of two thousand eight hundred and seventy-five dollars (\$2,875), and the balance of said share, to wit, the sum of five thousand five hundred

and twenty-three dollars and twelve cents (\$5,523.12) shall be paid to the said defendant Eugenia Brodhead in cash.

Three-thirty-seconds of said net proceeds, or the sum of twelve thousand five hundred and ninety-seven dollars and sixteen cents (\$12,597.16) belong to the defendant Josephine Bloodgood but her said share shall be charged with three eighths of the aforesaid sum of eleven thousand five hundred dollars (\$11,500), viz: with the sum of four thousand three hundred and twelve dollars and fifty cents (\$4,312.50), and the balance of said share, to wit, the sum of eight thousand two hundred and eighty-four dollars and sixty-six cents (\$8,284.66) shall be paid to the said defendant Josephine Bloodgood in cash.

Three-thirty-seconds of said net proceeds, or the sum of twelve thousand five hundred and ninety-seven dollars and sixteen cents (\$12,597.16), belong to the defendant Robert Fanshawe Bloodgood (his wife, the defendant Eloise P. Bloodgood, having duly released her inchoate right of dower in the said real property unto her said husband), but his said share shall be charged with three-eighths of the aforesaid sum of eleven thousand five hundred dollars (\$11,500), viz: with the sum of four thousand three hundred and twelve dollars

and fifty cents (\$4,312.50), and the balance of said share, to wit, the sum of eight thousand two hundred and eighty-four dollars and sixty-six cents, (\$8,284.66) shall be paid to the said defendant Robert Fanshawe Bloodgood, as follows: The sum of five thousand six hundred and twenty-four dollars and sixty-six cents (\$5,624.66) thereof shall be paid to him in cash and the balance thereof, to wit, two thousand six hundred and sixty dollars (\$2,660) shall be paid to him by the assignment to him by said Referee of an undivided one-half interest in the aforesaid bond and mortgage executed to said Referee by John Hoy to secure the sum of five thousand three hundred and twenty dollars (\$3,320), which said undivided interest in said bond and mortgage said Robert Fanshawe Bloodgood has consented to accept in lieu of cash for an equal amount.

One-half of said net proceeds or the sum of sixty-seven thousand one hundred and eighty-four dollars and eighty-seven cents (\$67,184.87), belongs to the defendant Henry Van Schaick for and during the term of his natural life; and at his death the said share will pass to and vest absolutely in such of the descendants of the said Henry Van Schaick as shall then be living, or in such persons as shall then be the legal owners or holders of said vested sub-shares by assignments from said surviving descendants; the said descendants to take their several sub-shares by representation; and it being impossible to determine at this time the persons to whom the said share, and its several divisions will be payable at the death of the said Henry Van Schaick (although all of the persons now in being who, at the time of the commencement of this action, had any vested or contingent interest in remainder therein were made parties to this action, and their presumptive future estates therein, as at present ascertained are as stated and set forth in the interlocutory

68 judgment in this action), and the said Henry Van Schaick not having filed any consent herein to receive a gross sum in satisfaction of his life estate or interests, the said one half of the net proceeds of the said sales, shall either be paid into Court, by the said Referee, for the purpose of being invested for the benefit of the said Henry Van Schaick; or, if within twenty days from the entry of this order, the said Henry Van Schaick shall furnish proper security, as hereinafter directed, for the safe keeping and preservation of the said sum during his life-time, to the end that at his decease the same may be paid over and distributed per stirpes among the descendants of the said Henry Van Schaick and the persons to whom the said share shall then belong, that then the said moiety of the said net proceeds shall be immediately paid over to said Referee to the said Henry Van Schaick to be held by him during his life, with the full use of the income thereof. The security above referred to may consist of a bond to be executed by the said Henry Van Schaick as principal, with the American Surety Company, a corporation organized and existing under the laws of the State of New York, as surety, to the descendants now living of the said Henry Van Schaick, who are parties to this action, and to such other descendants of the said Henry Van Schaick as shall survive him, and to such other persons as shall be entitled, upon the death of the said Henry Van Schaick to receive any portion of the share of the said proceeds in which he has a life interest. The said bond to be in the penal sum of seventy-five thousand dollars (\$75,000) and to be void if the said Henry Van Schaick shall, during his life time, safely keep and preserve the principal, of said share of said net proceeds, and the said bond shall after its execution and before the filing thereof, be approved by a Justice of this Court, and upon such approval being given the same shall be filed in the office of the Clerk of Albany County. The said last mentioned one-half of said net proceeds shall include and comprise the sum of thirty-eight thousand and thirty-nine dollars and eighty-seven cents, (\$38,039.87) in cash, and also the four remaining mortgages, and the bonds accompanying the same, executed to said Referee by the purchasers other than the said John Hoy, said four bonds and mortgages representing the aggregate sum of twenty-nine thousand one hundred and forty-five dollars (\$29,145) of the purchase money, and which said bond and mortgage shall, for the purpose of this distribution, be regarded as equivalent to cash for the amounts secured to be paid by them respectively.

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It is further ordered that the said Referee take receipts from the several parties to whom payments are made under any of the provisions of this order, and that he report his proceedings hereunder with all convenient speed.

It is further ordered that the accrued interest on the mortgages shall all belong to the parties to whom the mortgages shall be assigned; and the accrued interest on the moneys deposited in said Bank shall be distributed by the said Referee pro rata among the parties in the same proportions as the said parties are entitled to share in the distribution of said moneys so deposited.

Enter,

ALDEN CHESTER, J. S. C.

We consent to the entry of the foregoing order. Dated, New York City, January 27, 1897.

FREDERIC DE P. FOSTER,
Pltff's Atty.

CANTOR & VAN SCHAIK,
Attys. for Deft. Henry Van Schaick et al.

JOHN W. PIRSSON,
Atty. for Deft. Eugenia Brodhead et al.

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GRENVILLE B. WINTHROP,
Attorney for Deft. Elizabeth V. S. Winthrop.

I consent to the entry of the foregoing order subject to the approval of this Court.

AUG. T. GILLENDER,
Guardian ad Litem.

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We consent that the foregoing be settled and sealed as the bill of exceptions upon the plaintiff's writ of error to the Supreme Court of the United States. Dated, New York, April 1, 1918.

GEO. MURRAY BROOKS,
Attorney for Plaintiff.

WINTHROP & STIMSON,
Attorneys for Defendant American Surety Company of New York.

WILSON B. BRICE,
Attorney for Defendant Wilson B. Brice, as Exec., etc.

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[Endorsed:] District Court of the United States, Southern District of New York. The Brainerd, Shaler & Hall Quarry Company, Plaintiff, against Wilson B. Brice, as sole surviving executor of the Last Will and Testament of Henry Van Schaick, deceased, and The American Surety Company, Defendants. Bill of Exceptions. Geo. Murray Brooks, Attorney for Plaintiff, Equitable Building, 120 Broadway, Borough of Manhattan, New York City.

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In the District Court of the United States for the Southern District of New York, at a Term Holden in April, A. D. 1917, in the Federal Post-office Building, in the City and County of New York.

THE BRAINERD, SHALER & HALL QUARRY COMPANY, Plaintiff,
against

WILSON B. BRICE, as Sole Surviving Executor of the Last Will and Testament of Henry Van Schaick, Deceased, and The American Surety Company of New York, Defendants.

Petition for Writ of Error.

To the Hon. Julian W. Mack, Judge of the District Court aforesaid:

Now comes The Brainerd, Shaler and Hall Quarry Company, by George Murray Brooks, its attorney, and respectfully shows that on

the 12th day of April, A. D. 1917, the Court, upon the motion of the defendants, made an order herein dismissing the complaint on the sole ground that this Court has no jurisdiction of the subject-matter of this action, and that on said order a judgment was duly entered on the 26th day of April, A. D. 1917, dismissing the complaint herein.

Your petitioner, feeling itself aggrieved by the said order and the judgment thereon entered as aforesaid, herewith petitions the Court for an order allowing him to prosecute a Writ of Error to the Supreme Court of the United States, under the laws of the United States in that case made and provided.

Wherefore your petitioner prays that a Writ of Error to the Supreme Court of the United States for the correction of the errors complained of and herewith assigned be allowed and that an order be made fixing the amount of security to be given by the plaintiff in error, conditioned as the law directs.

Dated, New York, April 27th A. D. 1917.

GEO. MURRAY BROOKS,
Attorney for Plaintiff.

Writ of Error allowed as prayed for this 27th day of April A. D., 1917, and the amount of the bond fixed at \$250.00.

JULIAN W. MACK,
U. S. Circuit Judge.

75 In the District Court of the United States for the Southern District of New York, at a Term Holden in April, A. D. 1917, in the Federal Post-office Building, in the City and County of New York.

THE BRAINERD, SHALER & HALL QUARRY COMPANY, Plaintiff,
against

WILSON B. BRICE, as Sole Surviving Executor of the Last Will and Testament of Henry Van Schaick, Deceased, and The American Surety Company of New York, Defendants.

Assignment of Errors.

And now, on this 27th day of April, A. D. 1917, comes the plaintiff, by George Murray Brooks, its attorney, and says that the order made in this action dismissing the complaint on the sole ground that the court has no jurisdiction of the subject-matter of this action, and the judgment entered thereon on the 26th day of April, A. D. 1917, dismissing the complaint, is erroneous and unjust to the plaintiff for the following reasons:

First. That the learned District Court erred in dismissing the complaint in this cause for lack of jurisdiction.

Second. That the learned District Court erred in refusing to maintain jurisdiction of the claim set forth in the complaint.

Wherefore, the plaintiff prays that the said judgment be reversed, and that the District Court be instructed to proceed with the hearing and trial of the action.

Dated, New York, April 27th, A. D. 1917.

GEO. MURRAY BROOKS,

Attorney for Plaintiff.

120 Broadway, Borough of Manhattan, City of New York.

76 District Court of the United States of America for the Southern District of New York in the Second Circuit.

THE BRAINERD, SHALER & HALL QUARRY COMPANY, Plaintiff-Appellant,

against

WILSON B. BRICE, as Sole Surviving Executor of the Last Will and Testament of Henry Van Schaick, Deceased, and The American Surety Company of New York, Defendants-Respondents.

Bond on Appeal.

Know all men by these presents, That The Brainerd, Shaler & Hall Quarry Company as principal, and National Surety Company, a corporation under the laws of the State of New York, with its principal place of business at No. 115 Broadway, in the City, County and State of New York, as surety, are held and firmly bound unto the above named Wilson B. Brice, as sole surviving Executor of the Last Will and Testament of Henry Van Schaick, deceased, and the American Surety Company of New York, in the sum of Two Hundred and Fifty (\$250.00) Dollars to be paid to the said Wilson B. Brice, as sole surviving Executor of the Last Will and Testament of Henry Van Schaick, deceased, and the American Surety Company of New York, for the payment of which well and truly to be made, said principal and surety bind themselves, their heirs, executors, administrators and assigns, jointly and severally, firmly by these presents. Sealed and dated the 27th day of April, 1917.

77 Whereas, the above named The Brainerd, Shaler & Hall Quarry Company have prosecuted a writ of error to the Supreme Court of the United States to reverse the judgment rendered in the above entitled suit, by a Judge of the District Court of the United States for the Southern District of New York.

Now, therefore, the condition of this obligation is such, that if the above named The Brainerd, Shaler & Hall Quarry Company shall prosecute said writ to effect, and answer all damages and costs if it

fails to make its plea good, then this obligation shall be void, otherwise the same shall be and remain in full force and virtue.

NATIONAL SURETY COMPANY,
By WM. A. THOMPSON,
Resident Vice-President.

Attest:

E. M. McCARTHY,
Resident Assistant Secretary.

George M. Brooks, 120 Broadway, New York City, Attorney for Plaintiff.

I approve of the *written* Bond, and of the sufficiency of the surety thereon.

April 30, 1917.

JULIAN W. MACK,
U. S. C. J.

78 *Affidavit, Acknowledgment, and Justification by Guarantee or Surety Company.*

STATE OF NEW YORK,
County of New York, ss:

On this 28th day of April 1917, before me personally came Wm. A. Thompson, known to me to be the Resident Vice-President of National Surety Company, the corporation described in and which executed the foregoing Bond of The Brainerd, Shaler & Hall Quarry Company as surety and who, being by me duly sworn, did depose and say that he resides in the City of New York, State of New York; that he is the Resident Vice-President of said Company, and knows the corporate seal thereof; that the said National Surety Company is duly incorporated under the laws of the State of New York, that said Company has complied with the provisions of the Act of Congress of August 13, 1894, that the seal affixed to the within Bond of The Brainerd, Shaler & Hall Quarry Company is the corporate seal of said National Surety Company, and was thereto affixed by authority of the Board of Directors of said Company, and that he signed his name thereto by like authority as Resident Vice-President of said Company, and that he is acquainted with E. M. McCarthy and knows him to be the Resident Assistant Secretary of said Company; and that the signature of said E. M. McCarthy subscribed to said Bond is in the genuine handwriting of said E. M. McCarthy, and was thereto subscribed by order and authority of said Board of Directors, and in the presence of said deponent; and that the assets of said Company, unencumbered and liable to execution exceed its debts and liabilities of every nature whatsoever, by

79 more than the sum of Eight Million dollars.

WM. A. THOMPSON.
Deponent's Signature.

Signed, sworn to, and acknowledged before me this 27th day of April, 1917.

H. E. EMMETT,

Notary Public for Kings County, No. 9.

Certificate filed in New York County No. 20. Nassau, Bronx No. 1, Queens No. 631, Richmond and Westchester Counties; Kings County Register's Office No. 8008. New York County Register's Office No. 8023. Bronx County Register's Office No. 804. My commission expires March 30, 1918.

80 District Court of the United States, Southern District of New York.

THE BRAINERD, SHALER & HALL QUARRY COMPANY, Plaintiff,
against

WILSON B. BRICE, as Sole Surviving Executor of the Last Will and Testament of Henry Van Schaick, Deceased, and The American Surety Company of New York, Defendants.

Certificate.

In this cause, I hereby certify that this writ of error is allowed solely, and that the order herein dismissing the complaint was based solely, on the ground that no jurisdiction of the District Court existed; that this question has been determined by me on the following grounds.

This action is brought on a surety bond made by one Henry Van Schaick (since deceased) as principal, and the defendant The American Surety Company of New York, as surety, for the purpose of securing the due payment, at Henry Van Schaick's death, of the remainder-interests in a certain fund of money held by Henry Van Schaick as life tenant; that one Eugene Van Schaick (since deceased) was at the time of the assignment below mentioned the owner of one of the remainder-interests secured by said bond; that Eugene Van Schaick, during the continuance of the life-estate, assigned to the plaintiff a portion of his said remainder-interest, and thereafter survived the said Henry Van Schaick, and this action is based on such assignment; that Eugene Van Schaick was in his life time a citizen and resident of the State of New York

81 and both of the defendants are citizens and residents of the State of New York; that this suit could not have been prosecuted in this Court upon said remainder-interest and said bond if no such assignment had been made.

This certificate is made conformably to Section 238 of the Judicial Code.

JULIAN W. MACK,
U. S. Circuit Judge.

82 UNITED STATES OF AMERICA, *ss.*

The President of the United States to the Honorable the Judges of the District Court of the United States for the Southern District of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between The Brainerd, Shaler & Hall Quarry Company, plaintiff and Wilson S. Brice as sole surviving Executor of the Last Will and Testament of Henry Van Schaick, deceased, and The American Surety Company of New York, defendants, a manifest error hath happened, to the great damage of said plaintiff, The Brainerd, Shaler & Hall Quarry Company, as by *his* complaint appears, by which said judgment the complaint was dismissed on the sole ground that upon all the pleadings and proceedings had therein no jurisdiction of the District Court of the United States existed, and the action was dismissed for that reason alone!

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, in the said Supreme Court, within thirty days from the date thereof that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein, to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Edward Douglass White, Chief Justice of the United States, the 30 day of April, in the year of our Lord, one thousand nine hundred and seventeen.

[SEAL.]

ALEX. GILCHRIST, JR.,
Clerk U. S. District Court,
Southern District of New York.

M.

Allowed by
JULIAN W. MACK,
U. S. Circuit Judge.

84 UNITED STATES OF AMERICA, *ss.*

To Wilson B. Brice, as sole surviving executor of the last Will and Testament of Henry Van Schaick, deceased, and the American Surety Company of New York, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days

from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the United States District Court of the Southern District of New York, wherein The Brainerd, Shaler & Hall Quarry Company is plaintiff in error and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Julian W. Mack, United States Circuit Judge, this 30th day of April, in the year of our Lord one thousand nine hundred and seventeen.

JULIAN W. MACK,
*United States Circuit Judge, This 30th Day of
April, in the Year of Our Lord One Thou-
sand Nine Hundred and Seventeen.*

We hereby admit and accept service of the within Citation on behalf of the defendants in error this 4th day of May, 1917.

WINTHROP & STIMSON,
*Attorneys for Defendant American
Surety Co. of New York.*

WILSON B. BRICE,
*Attorney for Defendant Brice and
Defendant in Person.*

Filed May 4, 1917.

85 United States District Court, Southern District of New York.

THE BRAINERD, SHALER & HALL QUARRY COMPANY, Plaintiff,
against

WILSON B. BRICE, as Sole Surviving Executor of the Last Will and Testament of Henry Van Schaick, Deceased, and the American Surety Company of New York, Defendants.

Stipulation.

It is hereby stipulated that the portions of the record that shall constitute the transcript of record on appeal in this action shall consist of the following:

1. Summons.
2. Complaint.
3. Third Amended Answer—Wilson B. Brice.
4. Third Amended Answer—American Surety Co.
5. Order of Dismissal.
6. Judgment of Dismissal.
7. Bill of Exceptions.
8. Petition for Writ of Error, and order allowing same.

9. Assignment of Errors.
 10. Bond on Appeal.
 11. Writ of Error.
 12. Certificate of Writ of Error.
 13. Citation in Error.
 14. The foregoing Stipulation.
- Dated, New York, April 4, 1918.

GEORGE MURRAY BROOKS,
Of Counsel.
 WORCESTER, WILLIAMS & SAXE,
Attorneys for Plaintiff.
 WINTHROP & STIMSON,
Attorneys for Defendant American
Surety Company.
 WILSON B. BRICE,
Attorney for Defendant Wilson B
Brice, as Executor, etc.

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Stipulation on Appeal Record.

United States District Court, Southern District of New York.

THE BRAINERD, SHALER & HALL QUARRY COMPANY, Plaintiff,
 against

WILSON B. BRICE, as Sole Surviving Executor of the Last Will and
 Testament of Henry Van Schaick, Deceased, and the American
 Surety Company, Defendants.

It is hereby stipulated and agreed, that the foregoing is a true
 transcript of the record of the said District Court in the above-
 entitled matter as agreed on by the parties.

Dated New York, April 8, 1918.

GEORGE MURRAY BROOKS,
Of Counsel.
 WORCESTER, WILLIAMS & SAXE,
Attorneys for Plaintiff.
 WINTHROP & STIMSON,
Attorneys for American Surety Company.
 WILSON B. BRICE,
Attorney for Wilson B. Brice,
as Executor.

[Endorsed:] United States District Court, Southern District of
 New York. The Brainerd, Shaler & Hall Quarry Company, Plain-
 tiff, vs. Wilson B. Brice et al., Defendants. Stipulation as to cor-
 rectness of appeal record.

87 UNITED STATES OF AMERICA,
Southern District of New York, ss:

THE BRAINERD, SHALER & HALL QUARRY COMPANY, Plaintiff,

VS.

WILSON B. BRICE, as Sole Surviving Executor of the Last Will and Testament of Henry Van Schaick, Deceased, and The American Surety Company, Defendants.

I, Alexander Gilchrist, Jr., Clerk of the District Court of the United States of America for the Southern District of New York, do hereby Certify that the foregoing is a correct transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

In testimony whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, this tenth day of April in the year of our Lord one thousand nine hundred and eighteen and of the Independence of the said United States the one hundred and forty-second.

[Seal District Court of the United States, Southern District
of N. Y.]

ALEX GILCHRIST, JR., *Clerk.*

88 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the District Court of the United States for the Southern District of New York, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court, before you, or some of you, between The Brainerd, Shaler & Hall Quarry Company, plaintiff and Wilson S. Brice as sole surviving Executor of the Last Will and Testament of Henry Van Schaick, deceased, and The American Surety Company of New York, defendants, a manifest error hath happened, to the great damage of said plaintiff, The Brainerd, Shaler & Hall Quarry Company, as by his complaint appears, by which said judgment the complaint was dismissed on the sole ground that upon all the pleadings and proceedings had therein no jurisdiction of the District Court of the United States existed, and the action was dismissed for that reason alone:

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that

you have the same at Washington, in the said Supreme Court, within
 30 days from the date hereof, that the record and proceedings afore-
 said being inspected, the said Supreme Court may cause fur-
 89 ther to be done therein, to correct that error, what of right,
 and according to the laws and customs of the United States,
 should be done.

Witness, the Honorable Edward Douglass White, Chief Justice of
 the United States, the 30th day of April, in the year of our Lord,
 one thousand nine hundred and seventeen.

[Seal District Court of the United States, Southern District
 of N. Y.]

ALEX. GILCHRIST, JR.
*Clerk U. S. District Court, Southern
 District of New York.*

Allowed by

JULIAN W. MACK,
U. S. Circuit Judge.

90 [Endorsed:] L. 15—239. District Court of the U. S.,
 Southern District of New York. The Brainerd, Shaler & Hall
 Quarry Company, Plaintiff, against Wilson B. Brice, as sole surviv-
 ing Executor of the Last Will and Testament of Henry Van Schaick,
 deceased, and The American Surety Company of New York, De-
 fendants. Writ of Error. Geo. Murray Brooks, Attorney for Plain-
 tiff, Equitable Building, 120 Broadway, Borough of Manhattan,
 New York City. U. S. District Court. S. D. of N. Y. Filed Apr.
 30, 1917.

Endorsed on cover: File No. 26471. S. New York D. C. U. S.
 Term No. 1004. The Brainerd, Shaler & Hall Quarry Company,
 Plaintiff in Error, vs. Wilson B. Brice, as sole surviving Executor of
 the last will and testament of Henry Van Schaick, deceased, and The
 American Surety Company. Filed April 25th, 1918. File No.
 26471.